

# *Ecology Advisory Group on Water Trust, Banking, & Transfers*



**Legal Background**  
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# WHAT IS A WATER RIGHT?

- In Washington, water is a public resource owned by everyone.
- Water right holders have the right to use the water but do not own the water – it is a usufructuary right.
- A right to use water according to the terms and conditions of a water right document and the historic use of the water defined by specific elements.



# ELEMENTS OF A WATER RIGHT



- Point of diversion or withdrawal
- Instantaneous quantity ( $Q_i$ )
- Annual quantity (QA)
- Purpose of use
- Place of use
- Season of use
- Priority date



# PRIOR APPROPRIATION AND CONTINUOUS BENEFICIAL USE



***“First in time, first in right.”***

- A senior water right holder has priority over all junior water rights holders.
- Junior users cannot use water when that use would impair senior water rights.



***“Use it or lose it.”***

- A water right holder is required to beneficially use his/her water right. Failure to use all or even a portion of a right can result in partial or total loss of a water.
- Forfeited water rights become available for use both other junior water rights holders, including instream flows set by rules.
- Loss results from either intent to no longer use (abandonment) or non-use over a continuous 5-year period unless non-use exempted by statute (relinquishment).
- Relinquishment established in RCW 90.14.130 (1967), and exemptions listed in RCW 90.14.140.



# MOVING WATER RIGHTS



- Authority to move establishing in RCW 90.03.380 (1917).
- Water rights can be *transferred* to another person and place of use, including instream flows.
- Water rights can be *changed*:
  - Point of diversion/withdrawal
  - Place of use
  - Purpose of use
  - Season of use
- No loss of priority date
- A change can only be the “made without detriment or injury to existing rights”
- Many but not all changes/transfers to water rights require approval by Ecology.



# TRADITIONAL CHANGE/TRANSFER WITH ECOLOGY



- File change application with Ecology or Water Conservancy Board.
- Ecology conducts review of proposed transfer:
  - Public Notice
  - SEPA, if necessary
  - Extent and validity determination
  - Impairment analysis
    - Water Transfer Working Group review in Yakima Basin.
- Ecology/WCB issues Report of Examination (ROE).
- Water right can be used in new ways as authorized by ROE.

# TRUST WATER RIGHTS PROGRAM



- Program established by statute (RCW 90.42 and RCW 90.38 for Yakima Basin)
- A water right historically used for out-of-stream purposes is changed to instream purposes as well as potential other out-of-stream uses.
- Transfer may be temporary or permanent. Permanent transfers include deed of water right to Ecology and Trust Water Right Agreement.
- Can also donate a water right to the TWRP either temporarily or permanently.
- Priority date of water right remains the same as the original water right.
- **Water rights in trust are NOT subject to relinquishment.**
- Available for surface *and* groundwater rights.

# Evolving Use of TWRP



- Established as tool to maintain water rights (rather than relinquish) when deliberate steps are taken to do so, including application to Ecology.
- Long history of use for leases acquisitions to protect water rights instream for ecological benefit and avoid the “seniority problem” with instream flow rules.
- WA Water Trust, Trout Unlimited, and Ecology, among others, most active in the early 2000s using TWRP for instream flow improvement.
- Suncadia Resort used the TWRP as tool to acquire and transfer water rights to future water needs for resort and to mitigate impacts to senior water rights including Yakama Nation “time immemorial” water rights.
- WA Water Trust, Trout Unlimited, and Ecology, among others, began working with private establish water banks to enhance instream flow and provide economic opportunity for water right holders.
- RCW amended: 2003 to clarify water banking as tool authorized under the TWRP.

# Growth in “Water Banking” or Use of TWRP for Mitigation Strategies



- Since 2009, substantial increase in use by private and public water right holders to create pathways for mitigation of new uses.
- Suncadia, Masterson, Yakima Mitigation Services, and many other private banks providing exempt well mitigation in the Upper Yakima Basin were established and created mitigation market.
- WWT developed the Dungeness Water Exchange in Clallam County.
- TU developed water banks as mitigation strategies with MVID and other irrigation districts in North Central Washington.
- Kittitas County has developed its public groundwater mitigation program, Yakima County purchased water to mitigate for exempt wells through the Yakima County Water Resources System, and Benton County is developing its public groundwater mitigation program.
- Snoqualmie Valley Watershed Improvement District used TWRP to establish agricultural leasing program in King County.

# TWRP BANKING V. TRADITIONAL CHANGE/TRANSFER



- All of the same process for a traditional change/transfer:
  - Change application.
  - Ecology reviews application.
  - Ecology issues ROE.
- Plus, during Ecology's review process there needs to be a suitability analysis for the potential mitigation.
  - Can be done on the transfer into Trust if you know where the future mitigation is going to be (existing water banks in Yakima have green zones established), or
  - Can done in the ROE for the new mitigated permit issued when specific mitigation is identified.
- Plus, Ecology and water right holder must negotiate and enter into a Trust Water Right Agreement.
  - Very important step that includes discussions not covered by ROE.

# Questions?



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